

NO. 43

---

In the Supreme Court of the United States

OCTOBER TERM, 1943

---

INTERSTATE COMMERCE COMMISSION, THE PENNSYLVANIA RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, THE ERIE RAILROAD COMPANY, ET AL., APPELLANTS

v.

HOBOKEN MANUFACTURERS' RAILROAD COMPANY,  
APPELLEE

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF NEW JERSEY

---

BRIEF FOR APPELLANT, INTERSTATE COMMERCE  
COMMISSION

---

# INDEX

	Page
<b>OPINIONS BELOW</b>	1
<b>JURISDICTION</b>	1-2
<b>STATUTES INVOLVED</b>	2, 58
<b>QUESTIONS PRESENTED</b>	2-3
<b>STATEMENT OF THE CASE</b>	3-11
<b>PROCEEDINGS IN THE DISTRICT COURT</b>	11-16
<b>SUMMARY OF ARGUMENT</b>	16-22
<b>ARGUMENT</b>	22-56

I. The Commission was clearly correct in finding that the payments which Hoboken makes, under its contract with Seatrail, did not constitute costs to be considered by the Commission in dividing joint through rates	22-43
II. The Commission did not fail to make any essential finding required of it by statute	43-47
III. The order of the Commission is supported by substantial evidence	47-52
IV. The issue of confiscation	52-54
V. The case is not moot	55-56
<b>CONCLUSION</b>	56-57
<b>APPENDIX</b>	58-60

## STATUTES

Declaration of Policy, added by the Transportation Act, 1940	58
Section 1 (4) of the Interstate Commerce Act	59
Section 15 (6) of the Interstate Commerce Act	59-60

## CASES CITED

<i>Aetna Insurance Co. v. Hyde</i> , 275 U. S. 440	53
<i>Atchison Ry. Co. v. United States</i> , 295 U. S. 193	23
<i>Baltimore &amp; Ohio R. Co. v. United States</i> , 298 U. S. 349, 21, 31, 33, 54	
<i>Beaumont; S. L. &amp; W. Ry. Co. v. United States</i> , 282 U. S. 74	21, 53
<i>Dayton-Goose Creek Ry. Co. v. United States</i> , 263 U. S. 456	56
<i>Hoboken Manufacturers R. Co. v. Abilene &amp; Southern Ry. Co.</i> , 237 F. 2d 97	38, 51

	Page
<i>Interstate Commerce Commission v. Union Pacific R. Co.</i> , 222 U. S. 541	16
<i>Investigation of Seatrain Lines, Inc.</i> , 195 I. C. C. 215; 206 I. C. C. 328	4, 50
<i>New England Divisions Case</i> , 261 U. S. 184	8
<i>St. Louis Southwestern R. Co. v. United States</i> , 245 U. S. 136	22
<i>Seatrain Lines, Inc., v. Akron, C. &amp; Y. R. Co.</i> , 226 I. C. C. 7; 243 I. C. C. 190	38, 50
<i>Southern Pacific Terminal Co. v. Interstate Commerce Commis- sion</i> , 219 U. S. 498	56
<i>Swift &amp; Co. v. United States</i> , 316 U. S. 216	23
<i>United States v. American Tin Plate Co.</i> , 301 U. S. 402	16, 23
<i>United States v. Pan American Petroleum Corp.</i> , 304 U. S. 156	23
<i>Western Chemical Co. v. United States</i> , 271 U. S. 268	52

# In the Supreme Court of the United States

OCTOBER TERM, 1943

---

No. 43

INTERSTATE COMMERCE COMMISSION, THE PENNSYLVANIA RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, THE ERIE RAILROAD COMPANY, ET AL., APPELLANTS

v.

HOBOKEN MANUFACTURERS' RAILROAD COMPANY,  
APPELLEE

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF NEW JERSEY

---

BRIEF FOR APPELLANT, INTERSTATE COMMERCE  
COMMISSION

---

## OPINIONS BELOW

The opinion of the District Court (R. 109) is reported in 47 F. Supp. 779. The report of the Commission (R. 32) is published in 234 I. C. C. 114.

## JURISDICTION

The final decree of the District Court was entered on January 8, 1943 (R. 127, 128). Petition

for appeal was filed March 8, 1943 (R. 128), and was allowed the same day (R. 132). Probable jurisdiction was noted on May 3, 1943 (R. 658). Jurisdiction is conferred by section 5 of the Commerce Court Act, c. 309, 36 Stat. 539, 543, 28 U. S. C., section 45a; section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C., section 345, and the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219-221, 28 U. S. C., sections 45, 47a.

### STATUTES INVOLVED

Pertinent provisions of the statute are set forth in the Appendix, *infra*, pp. 58-60.

### QUESTIONS PRESENTED

1. In passing upon the reasonableness of rail divisions out of joint class and commodity rates applicable on traffic interchanged by the Hoboken Manufacturers' Railroad Company, a switching line, with Seatrain Lines, Inc., a common carrier by water, where the Commission found that the Hoboken's payments to Seatrain covered no rail transportation services and could not be included in the costs thereof, and the court agreed that the Commission's determination of this question was final, may the Court nevertheless require the Commission to include in the Hoboken's divisions of the rail rates something in respect of such payments?
2. Whether, in view of the Commission's de-

termination that the railroad's duty to deliver freight and rail transportation ended at the cradle on the dock adjacent to the vessels of the Seatrail, which finding the lower court accepted (R. 116) the District Court's subsequent action in remanding the case to the Commission to include "in the base upon which Hoboken's fair return is calculated, the true value of the Seatrail devices" (R. 118) was erroneous and a usurpation by the Court of authority which it did not possess?

3. Whether the Commission made the necessary findings.

4. Whether the findings made by the Commission were supported by the evidence.

#### STATEMENT OF THE CASE

Review is sought of an order of the Interstate Commerce Commission dated July 24, 1939 (R. 60, 70), finding, after full hearing, that the divisions received by the Hoboken Manufacturers' Railroad Company out of joint class and commodity rates on traffic interchanged by the Hoboken with Seatrail Lines were not unjust, unreasonable, inequitable, or unduly prejudicial (R. 49).

The Hoboken is a single track, terminal-switching line extending along the water front of Hoboken, N. J., a distance of 1.632 miles (R. 33). It connects with the Erie Railroad and through the Erie with other trunk lines reaching the New York Har-

bor area (R. 33). It interchanges traffic also with the Delaware, Lackawanna & Western Railroad through a float bridge (R. 33). Numerous piers are served by the Hoboken, at which various steamship lines regularly dock, including the vessels of Seafarin Lines, Inc. (R. 33). The Seafarin, the operations of which are described in *Investigation of Seafarin Lines, Inc.*, 195 I. C. C. 215, 206 I. C. C. 328, is a common carrier by water subject to the Commission's jurisdiction (R. 33). Since 1932 it has operated vessels, on which it transports freight in railroad cars, between Hoboken, N. J., Havana, Cuba, and Belle Chasse, La., a point on the west bank of the Mississippi River about 10 miles south of New Orleans (R. 33). The Seafarin plan of operation is unique. It is described in the decision of the lower court as follows (R. 110):

Seafarin Lines, Inc. (hereinafter referred to as "Seafarin") operates three ships. These are fast four-decked vessels, carrying standard gauge railroad tracks. Two of the vessels can carry one hundred freight cars each and the third ninety-five cars. The vessels operate between Hoboken, New Jersey and Belle Chasse in Louisiana, via Havana, Cuba. When a Seafarin ship is put in position at its dock, it is next to a "cradle" which, by means of a large overhead crane, lifts the loaded freight car from the dock and carries it through one of a number of large hatches on the ship

to one of the tracks within the vessel. The tracks of the cradle fit the tracks on ship, and the car is then pushed off the cradle to its place on the ship by a special little engine. There is one cradle for each track on each deck of the vessel and, when the loading of each deck is accomplished, the cradles are left in place flush with the deck, each cradle closing a hatch. In taking the car from ship to shore the process is reversed. By the use of the Seatrain method, goods and merchandise may be transported from shore to ship and from ship to shore without breaking bulk, and the necessity of loading and unloading the freight is eliminated.

The expense of loading and unloading freight to and from cars, ordinarily necessary in through transportation with break-bulk water carriers, is not incurred in the Seatrain operation (R. 47).

In 1932 Seatrain acquired control of Hoboken, all shares of the Hoboken's capital stock except five directors' qualifying shares being owned by the Seatrain, with common officers (R. 33-34).

In 1936, the Hoboken filed a complaint with the Commission (No. 27630) alleging that the divisions it was receiving out of joint class and commodity rates on traffic interchanged by the Hoboken with Seatrain were too low and seeking an increase (R. 22). Section 1 (4) makes it the duty of every common carrier subject to its provisions, in the case of joint rates, fares or charges "to

establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers." The Hoboken also sought "adjustment" on all freight transported subsequent to the date of the filing of the complaint and moving under rates prescribed by the Commission (R. 26).

On carload traffic loaded or unloaded by the Hoboken or at its expense, its division of the joint through rate is \$1.35 per ton; on carload traffic loaded or unloaded by the shipper or consignee or at their expense, the Hoboken division is 60 cents per ton (R. 37). In other words, where it is unnecessary to load and unload freight to and from railroad cars, as in making interchange with Seatrain, the rail defendants do not have to incur an expense of 75 cents per ton for such loading or unloading, which expense is incurred when freight moving under lighterage-free rates<sup>1</sup> is interchanged with other water carriers (R. 38-39).

Under the lighterage-free rates the service which the railroads hold themselves out to perform includes the unloading of in-bound cars and the placing of the lading within reach of ship's tackle and a corresponding but reverse service on out-bound freight (R. 47). Under the non-lighterage-free rates the shipper performs the unload-

<sup>1</sup> Some of the freight from and to Seatrain and some of that from and to other steamship lines moves under lighterage-free rates and some under non-lighterage-free rates.

ing and loading of cars and, therefore, the Hoboken has only switching service to perform for which it is accorded 60 cents under the tariffs (R. 111). Upon Seatrain freight the trunk lines have accorded the Hoboken the 60-cent switching division out of the lighterage-free rates (the same as out of the non-lighterage-free rates) because there is no necessity for loading or unloading Seatrain freight as in the case of break-bulk traffic with the ordinary steamship company in order to effect shipside receipt or delivery (R. 37-38).

The Hoboken's complaint to the Commission was only as to the divisions as between it and its immediate rail connections (R. 33), and, in the words of the Commission (R. 38), it sought a:

division of 60 cents per ton out of non-lighterage-free rates and, \$1.35 per ton out of lighterage-free rates. In other words, it is satisfied with its division out of non-lighterage-free rates if it receives \$1.35 as its division of the lighterage-free rates. Whether it is entitled to a greater division out of the lighterage-free rates depends in large part on whether certain payments which complainant makes to Seatrain may be properly included in its costs for performing its part of the rail transportation to and from Hoboken.

The Hoboken's justification for a division of \$1.35 on Seatrain lighterage-free traffic is, in substance, that if it is not thus enabled to pay Sea-

train, in accordance with its agreement, the trunk lines will obtain some benefit from Seatrain's use of the shiploading devices to the extent that they would be relieved of the expense of 75 cents per ton which they incur when cars are actually loaded or unloaded, in order to effect shipside receipt or delivery. (R. 38-39).

The Commission investigated the issues, hearings were conducted, briefs were filed, a proposed report was prepared and served, to which the Hoboken filed extensive exceptions, oral argument was had before the entire Commission, following which the report and order under review was issued. There is no contention that a full hearing was not accorded, and the lower court so found. (R. 115).

*New England Divisions Case*, 261 U. S. 184, 200.

The report reviews the fact of acquisition of control of Hoboken by Seatrain in 1932 (R. 33-34), and the rearrangements necessary in connection with the Seatrain operation (R. 34). The cost of installing a crane was about \$85,000, and the crane, together with the pier on which it is erected and a slip alongside the pier at which Seatrain vessels are berthed, is leased to Seatrain from the Hoboken (R. 34). The ascertainment of the rental therefor is described in the Commission's report (R. 34), and for the year beginning March 1, 1937, it amounted to more than \$19,000 for the pier and slip and over \$13,000 for the crane (R. 34).

In overruling Hoboken's allegation that the

"saving" of 75 cents per ton is possible because of Seatrain's investment and use of patented devices, obviating the necessity of loading and unloading freight, and therefore such saving should accrue to Seatrain and not to the rail defendants, the Commission said:

The service which the railroads hold themselves out to perform under the lighterage-free rates includes the unloading of in-bound cars and the placing of the lading within reach of the ship's tackle and a corresponding but reverse service in connection with out-bound freight. For purposes of its own, Seatrain prefers to receive and deliver the loaded car. The unloading or loading of the car lading and its delivery or receipt at ship's tackle is therefore unnecessary. *The rail lines do all that is required when they place the cars in or take them from the Seatrain cradle.* From this point of view the payments which complainant makes to Seatrain cover no part of its transportation service under the lighterage-free rates and are in addition to the full costs of that service (R. 47). [Italics ours.]

The District Court accepted this finding as correct (R. 116), and said:

Placing the cars upon the cradle or removing them therefrom satisfied all those requirements (R. 114).

On the next page (R. 48) the Commission also said:

\* \* \* The new method of transfer puts the connecting rail lines to less expense under the lighterage-free rates than the old method. It may be argued, therefore, that they would be justified in making any payments that might be necessary for the purpose of inducing the establishment of the new method of transfer, provided they were left with a net saving. There is here, no evidence, however, that payments were or are necessary for this purpose. The contract between Seatrain and complainant, to which defendant rail lines are not parties, is not evidence to this effect, in view of the control which Seatrain exercises over complainant. No such payments have, so far as the record shows, been exacted or obtained by Seatrain from an independent rail connection. There is ample reason to conclude, also, that the improved method of transfer is only an incident to the Seatrain plan of transportation, and that this plan has sufficient advantages to impel its use and promotion by Seatrain regardless of any contributory payments from rail connections.

It is true, as complainant points out, that if the payments which it now makes to Seatrain are not borne by defendant rail lines through a decrease in their divisions and a corresponding increase of complainant's divisions, they will receive

an unearned benefit. This comes about from the fact that this new method makes it unnecessary for the rail lines to perform all the service which they hold themselves out to perform under the lighterage-free rates. Those rates, however, are based on average conditions, and a similar unearned benefit would accrue if a steamship company now docking on the Manhattan water front and served by lighter should shift to a dock with direct rail connections on the Jersey shore. It would hardly be suggested that in such an event the defendant rail lines should compensate the steamship company for the change (R. 48).

#### PROCEEDINGS IN THE DISTRICT COURT

On August 27, 1940, the Hoboken filed its bill of complaint seeking an injunction against the Commission's order of July 24, 1939, which dismissed its complaint (R. 60). The United States was named as defendant (R. 1). The Interstate Commerce Commission (R. 57) and the Trunk Line railroads<sup>2</sup> intervened. The principal basis of the suit was an attack upon the finding of the Commission that the payments made by Hoboken to Seatrain under the contracts between them was no part of the Hoboken's legitimate transportation costs to be included in fixing its

<sup>2</sup> The Baltimore & Ohio Railroad Company, the Pennsylvania Railroad Company, the Erie Railroad Company, the Delaware, Lackawanna and Western Railroad Company, the New York Central Railroad Company, et al (R. 66).

divisions of the joint rates (R. 17-19). Other allegations were: that the Commission, in dismissing the complaint, failed in its duty under the Statute to "prescribe just, reasonable, and equitable divisions" to be received by the several carriers (R. 16-17); that necessary findings were not made (R. 20) and that the findings were not supported by evidence (R. 18-19).

The case was argued twice in the District Court, and on November 24, 1942, that court filed its opinion (R. 109) upholding the report in certain particulars (R. 115-116) but remanding the proceeding to the Commission to make findings which the court deemed necessary (R. 117-119). In its opinion the District Court said (R. 114):

The Commission concludes that the record before it warrants the finding that the former division of 60¢ and the present divisions of 63¢ and 66¢ a ton on lighterage-free freight are sufficient to cover the cost of the services performed by Hoboken and also constitutes a reasonable return on the property owned or used by Hoboken in performing such service. The Commission goes on to say, and we think correctly, that the service that the railroads hold themselves out to perform under the lighterage-

\* The first argument, before Circuit Judge Clark and District Judges Fiske and Walker, occurred on June 19, 1941 (R. 1). Before any decision was forthcoming, Judge Clark entered the Army and Judge Walker resigned, necessitating reargument, which was had on April 18, 1942, before Circuit Judge Biggs and District Judges Fiske and Smith (R. 1).

free rates includes the unloading of inbound cars and the placing of the lading within reach of the ship's tackle and a corresponding but reverse service in connection with out-bound freight. Placing the cars upon the cradle or removing them therefrom satisfied all those requirements.

After stating "there is here no contention that the proceedings before the Commission were not fair and adequate in every way" (R. 115), the lower court held that "the finding by the Commission that rail transportation ends at the cradle when Hoboken has put the car consigned for Seatrain upon it and begins at the cradle when the movement is reversed is fully supported by the evidence" (R. 116). The court also said:

\* \* \* Since, as the Commission determined, transportation ends at the cradle, Hoboken completes its obligation under the lighterage-free tariff when it delivers the cars to the cradle. The Commission, therefore, held that the payments by Hoboken to Seatrain do not constitute a legitimate transportation cost. Upon this finding, supported by evidence, its judgment is final \* \* \* (R. 116).

The Commission, so far as the issues presented were concerned, might well have concluded its report with the findings that "Hoboken completes its obligation under the lighterage-free tariff when it delivers the cars to the cradle" (R. 116) and that "the payments by Hoboken to Seatrain do not con-

stitute a legitimate transportation cost" (R. 116) and cover no part of Hoboken's transfer service under the lighterage-free rates.

But the report did not stop with this finding, purely administrative in nature. The Commission pursued the subject further, and discussed the question "whether such payments may be justified, in any way and to any extent, as compensation properly payable to Seatrain for the savings which it has accomplished for the rail lines by its new method of transfer" (R. 48). We believe such a discussion was strictly unnecessary to a decision, because what the Commission had already said was sufficient to dispose of the case. The lower court referred to the contract between Hoboken and Seatrain and said

The Commission did not determine the validity of the contract, but dismissed the entire question of the contract payments on the theory that Hoboken would receive the same interconnecting facilities irrespective of the payments (R. 117).

It added (R. 117):

\* \* \* The Commission should have determined the *quantum meruit* of the relationship. It is possible that there was no service or relationship of value. Even such a finding would not necessarily result in a dismissal of the complaint. If there is a windfall in the case at bar by reason of Hoboken's right under its contract to use the Seatrain devices to fulfill its obligations of

carriage, the Commission should determine that fact and also an equitable basis for division of the windfall between Hoboken and the trunk-line carriers. This the Commission has failed to do by appropriate findings.

The court remanded the case to the Commission with directions (R. 126).

(a) to reconsider the decision; (b) to determine whether or not the relationship between Hoboken and Seatrain is of value; (c) if the Commission should find that the relationship is of value, to determine the amount of that value to be allowed in establishing Hoboken's legitimate costs; (d) to make a finding as to whether or not the allowance to the trunk-line carriers of the entire saving of 75¢ per ton occasioned by the use of the Seatrain interconnection is "unduly preferential or prejudicial as between the carriers"; and (e) if the Commission should find that the allowance of the entire 75¢ to the trunk-line carriers is unduly preferential or prejudicial, to determine an equitable division of the 75¢.

It seems to be the court's view that some, at least, of the "saving" accruing to the trunk lines as a result of Seatrain's use of its devices should be included in the Hoboken's costs; the Commission takes a contrary view. The Commission's report contained a full discussion and adequate findings as to the absence of any "worth" to the

Hoboken of Seatrain's use of its ship-loading devices and methods of operation, and found that the rail transportation services ended at the cradle, and hence that anything beyond that point was no part of a railroad's legitimate costs (R. 47). We think the court has attempted to substitute its judgment for that of the Commission upon an administrative matter, and overlooked the rule stated in the case of *Int. Com. Com. v. Union Pacific R. R.*, 222 U. S. 541, 547, that a court "will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling."

#### SUMMARY OF ARGUMENT

I. The Commission's findings that the service which the railroads hold themselves out to perform under the lighterage-free rates includes the unloading of in-bound cars and the placing of the lading within reach of ship's tackle and a corresponding but reverse service on out-bound traffic, and that the rail lines do all that is required under the rates sought to be divided in this case when they place the cars in or take them from the Seatrain cradle, (R. 47) findings accepted by the District Court, (R. 116) are administrative findings, and being supported by substantial evidence, are conclusive. (*U. S. v. American Tin Plate Co.*, 301 U. S. 402, 408). Consequently the Commission was clearly correct in holding that it would not include in the Hoboken's operating expenses,

for the purpose of dividing the rail rates, payments which the Hoboken makes under a contract with Seatrain Lines, Inc., the controlling company. The payments to Seatrain, as found by the Commission, did not relate to any necessary part of the Hoboken's rail transportation service under the rates to be divided. Seatrain's ship-loading device "is only an incident to the Seatrain's plan of transportation," and "has sufficient advantages to impel its use and promotion by Seatrain regardless of any contributory payments from rail connections" (R. 48). The Commission also found that the present divisions "are sufficient to cover the cost of the service performed by complainant [Hoboken] and also a reasonable return on the property owned or used by it in performing such service" (R. 41). In fact, counsel for appellee conceded before the Commission if it was not proper to consider the payments which Hoboken makes to Seatrain as a part of Hoboken's costs, the divisions are adequate and "we are not entitled to anything more" (R. 619).

The Commission also considered the question whether such payments may be justified, *in any way and to any extent*, as compensation properly payable to Seatrain for the savings which it has accomplished for the rail lines by its new method of transfer (R. 48). The District Court held the Commission should have determined the *quantum meruit* of the relationship (R. 117) and if there is

a "windfall" (R. 117) the Commission should determine that fact and also an equitable basis for the division of the "windfall" between the Hoboken and the trunk lines (R. 117) and remanded the case to the Commission to make findings thereon (R. 126). But the payments are not for any benefit to the rail lines under the rail rates, but are for water transportation services beyond and in excess of anything covered by the rail rates applicable to and from Seatrain's car cradle. The services accomplished by the Seatrain devices are a part of its transportation to be compensated for out of its water rates and revenues. In fact, in another complaint (R. 643) Seatrain, a common carrier by water, is seeking from the rail lines a larger share of the rail-water rates and relies in part upon the alleged labor-saving value of its special cradle and car elevator devices and patents. Docket 28668, *Seatrain Lines v. A. C. & Y. R. R. Co., et al* (R. 643). Accordingly if the Commission was right in finding transportation under the rail rates ends at the cradle, any payment, to any extent, on the theory that Seatrain is benefiting the rail lines in a way entitling it to compensation, means that Seatrain is seeking to be paid twice for its patented device. Seatrain has devoted its patented device to the public use as an essential aid to its scheme of water transportation, and if not satisfied with the yield from the water rates, may not look to the preceding rail rates to add to its compensation. In the last analysis it is

the shipper who bears both rates covering the through transportation and he cannot be asked to pay Seatrain twice for the transfer service.

This decided interest of the shippers in the savings resulting from the patented device raises the question of whether in any event the railroads are free to contract to make payments to Seatrain of said savings, or any part thereof.

The Commission did discuss the question of a "windfall," which the lower court apparently overlooked in remanding the case to the Commission for additional findings, although the Commission used the term "unearned benefit" (R. 48). It held against the contention that there was an "unearned benefit" (R. 48), pointing out, among other things, that the rates were based on average conditions.

If Seatrain were to receive from Hoboken the cost of its patents and the trunk lines were to reimburse Hoboken, it would place the entire burden of the transfer costs on the trunk lines. Seatrain pays \$50,000 a year in royalties on its combination patents which expire in 1944 (R. 39). If the trunk lines were to assume Seatrain's patent expense by increasing Hoboken's divisions, this would be to require the trunk lines to bear the expense of loading and unloading Seatrain's vessels because it would transfer the actual point of interchange between Hoboken and Seatrain from alongside the ship at the car cradle to a theoretical point of interchange in the hold of the ship.

As tending to show the reasonableness of the divisions received by Hoboken of 60 cents a ton prior to March 28, 1938, and 63 and 66 cents a ton subsequent thereto (R. 111), which represent an increase of 215 and 230 percent over the 20-cent per ton allowance in effect prior to July 1, 1918 (R. 113), it is shown that if the divisions had increased in the same manner as the rates increased, the Hoboken's present allowances would range from 38 to 42 cents, depending upon commodities and territorial application of the rates (R. 113).

II. The Commission did not fail to make any essential finding. Its report discusses the traffic handled by Hoboken and the cost thereof, and it reaches the conclusion that the existing divisions are not unjust or unreasonably low. The lower court's holding that the Commission should discuss the question of a "windfall" accruing to the trunk lines overlooks the fact that the Commission did in fact pass upon this question and made findings thereon.

III. The order of the Commission is supported by substantial evidence. While the length of the record is not necessarily controlling, it covers more than 450 pages of the printed record. It is significant also that the lower court in its opinion held that "there is here no contention that the proceedings before the Commission were not fair and adequate in every way" (R. 115). The court also affirmed the conclusion of the Commission "that the payments by Hoboken to Seatrain do

not constitute a legitimate transportation cost. Upon this finding, supported by evidence, its judgment is final" (R. 116). The lower court stated too that "the finding by the Commission that rail transportation ends at the cradle when the Hoboken has put the car consigned for Seatrain upon it and begins at the cradle when the movement is reversed, is fully supported by the evidence" (R. 116).

IV. No proper foundation has been laid for an allegation of confiscation. The complaint in this case did not properly present the issue of confiscation (*Beaumont, Sour Lake & Western Ry. Co. v. United States*, 282 U. S. 74, 88-89). It was conceded in this case in the argument before the Commission that with the payments by Hoboken to Seatrain excluded, then the divisions which Hoboken receives, "are adequate divisions and we are not entitled to anything more" (R. 619).

No charge of confiscation can be made in a divisions case where the joint rates sought to be divided are not attacked as unreasonable. (Concurring opinion in *Baltimore & Ohio R. Co. v. United States*, 298 U. S. 349, 381-392.)

V. The Court's attention is directed to the fact that Seatrain vessels have been taken over by the Government for other purposes, and are not now operating. Seatrain's service to and from Hoboken was discontinued on or about February 1, 1942, and the question of mootness will at once arise. We do not believe the case is moot. Follow-

ing the conclusion of the war, when the boats are returned to Seatrain, if the Commission's order is in effect, the parties can resume operations immediately and a known basis of divisions will exist. In the Hoboken's complaint to the Commission, it asks for "an adjustment" in the past divisions and reparation. Whether it is entitled to "adjustment" cannot be determined if the case is held moot.

### ARGUMENT

#### I

**The Commission was clearly correct in finding that the payments which Hoboken makes, under its contract with Seatrain, did not constitute costs to be considered by the Commission in dividing joint through rates.**

This case involves the divisions<sup>1</sup> of joint through rates between common carriers by railroad, the Hoboken, a terminal switching carrier, on the one hand and the Eastern Trunk Lines, on the other (R. 32-33). Although Seatrain Lines, Inc., a common carrier by water, is referred to frequently in the report of the Commission, no divisions between it and the rail carriers are involved.

<sup>1</sup>Defined in *St. L. S. W. Ry. Co. v. United States*, 245 U. S. 136, 139 (footnote 2), as "the share of the 'joint rate' to be received by each."

Divisions between Seatrain and the railroads are involved in Docket No. 28668, *Seatrain Lines, Inc., v. The Ahnapee & Western Ry. Co. et al.*, filed May 22, 1941. The respective rights of Seatrain, on the one hand, and the railroads, on the other, are under consideration in Docket No. 28668, the complaint in which is in this record (R. 643).

The "storm center" of the suit is the finding by the Commission that the payments which the Hoboken makes under a contract with the Seatrain, the controlling company, should not be included as a necessary part of the cost of the rail transportation service performed by the Hoboken (R. 38). The Commission determined that the Seatrain's patented device, permitting transfer of freight cars from dock to vessel without the necessity of loading or unloading, "is only an incident to the Seatrain's plan of transportation, and that this plan has sufficient advantages to impel its use and promotion by Seatrain regardless of any contributory payments from rail connections" (R. 48). The Commission found that "the rail lines do all that is required when they place the cars in or take them from the Seatrain cradle" (R. 47). Further, that "the payments which complainant makes to Seatrain cover no part of its transportation service under the lighterage-free rates and are in addition to the full costs of that service" (R. 47).

It is well settled by many decisions of this Court that the question as to where transportation ends is an administrative question for determination by the Commission. *Atchison Ry. Co. v. United States*, 295 U. S. 193, 201; *United States v. American Sheet & Tin Plate Company*, 301 U. S. 402, 408; *United States v. Pan American Petroleum Corporation*, 304 U. S. 156, and *Swift &*

*Company v. United States*, 316 U. S. 216. The lower court did not question this well-settled principle and held that the placing of the cars upon the cradle or removing them therefrom satisfied the railroad's obligation under the lighterage-free rates (R. 115). It also held that "the finding by the Commission that rail transportation ends at the cradle when Hoboken has put the car consigned for Seatrain upon it and begins at the cradle when the movement is reversed," is fully supported by the evidence (R. 116). It also upheld as "final" (R. 116) the Commission's finding that "the payments by Hoboken to Seatrain do not constitute a legitimate transportation cost" (R. 116), because supported by evidence (R. 116).

The Commission, after making these findings, passed on to the question of whether such payments may be justified, *in any way and to any extent*, as compensation properly payable to Seatrain for the savings which it has accomplished for the rail lines by its new method of transfer" (R. 48).

Under an agreement dated November 21, 1932 (R. 38) between Hoboken and Seatrain, it was agreed that Seatrain would perform as agent for Hoboken the necessary physical handling of the cars between the car cradle and the hold yard and for such service Hoboken agreed to pay Seatrain 40 cents per net ton for each ton of freight, other than coal, loaded into or discharged from

Seatrain's vessels (R. 38, 52). In 1936, Hoboken paid Seatrain approximately \$110,000 under this contract (R. 39). The contract was cancelled as of March 1, 1937, and under an agreement dated February 24, 1937 (R. 38, 53), Hoboken obligated itself to pay Seatrain 73 cents per ton for each ton of freight interchanged between them and moving on lighterage-free rates\* (R. 38). Since March 1, 1937 all of the physical handling of the cars in rail service to and from the Seatrain cradle has been performed by and at the expense of Hoboken (R. 38) without any service rendered by Seatrain.

If, as stated in the report of the Commission and agreed to by the Court, the payments are not made for any service which the rail lines perform under the lighterage-free rates (R. 48), there would appear to be no remaining question in this proceeding involving only the Hoboken and the trunk lines, whether such payments may be justified in any way, *or to any extent* (R. 48), as compensation properly payable to Seatrain for the savings resulting from Seatrain's ship-loading devices and method of operation. The patented device and Seatrain's whole manner of transportation does away with the need for the maximum service covered by the rates, namely, the unloading of the contents of the car and placing it at a spot

\* No such payment is made by Hoboken to Seatrain on non-lighterage-free freight (R. 38), although Hoboken's service is the same in both instances (R. 340).

within reach of ship's tackle (R. 48). The rail rates are applicable to the Seatrain's freight pursuant to the finding in the report that, under such rail rates, transportation ends at the cradle (R. 47), but they cannot be said to contemplate any part of the service of lifting the cars into the boat and spotting them on the tracks. The payments are not for a benefit to the rail lines under the rail rates, but are for a transfer service beyond and in excess of anything covered by those rates. The services performed by Seatrain's devices are part of its transportation to be compensated for out of its water rates and revenue. Since transportation under the rail rates ends at the cradle, any payment, *to any extent* (R. 48), on the supposition that Seatrain is benefiting the rail lines in a way entitling it to compensation, would mean that Seatrain was seeking compensation twice for its patented device.

In view of the above, it seems clear that compensation and services under the rail rates on the one hand, and Seatrain's separately established water rates, on the other, must be kept separate. It would seem that the transfer service of lifting the loaded cars on to the boat and spotting them on deck tracks, which is accomplished by Seatrain's patented device, is so much a part of its whole scheme of transportation that, without it, it would not be in existence; and, therefore, that it would normally, if not necessarily, be assigned as

practically an inseparable part of Seatrain's transportation as a whole (R. 48). Moreover, Seatrain without doubt would not accept the 75-cent payments on the understanding that its water rate is to be cut down to the basis of a rate for its transportation service minus the transfer service at Hoboken (or some indefinite part thereof) of lifting and spotting the loaded cars on the deck tracks. But unless that is the case Seatrain is, through its contract with the Hoboken, seeking double compensation, and the burden of such contract may not be equitably shifted to the trunk lines. In any event and as conceded by the lower court, the Commission's report is clearly right in its finding that transportation under the rail rates ends at the cradle (R. 116). It necessarily follows that the rates to which Seatrain must look are its separately established water rates for the transportation service beyond.<sup>5</sup> Seatrain has devoted its patented device to the public use as an essential aid to its scheme of water transportation and, if

<sup>5</sup> As a matter of fact, in a pending complaint which is included in this record (R. 643) filed on May 22, 1941, entitled *Seatrain Lines, Inc., v. The Akron, Canton & Youngstown Railway Company et al.* (naming Hoboken Manufacturers' Railroad Company as a defendant therein), and docketed with the Commission as No. 28668, Seatrain alleges its divisions of rates applicable on traffic handled in connection with the rail lines via Hoboken, N. J., are unreasonably low, seeks increased divisions, and in support thereof relies in part upon the alleged labor-saving value of its special cradle and car elevator devices and patents (R. 648).

not satisfied with the yield from its water rates as subject to regulation and competitive conditions, it still may not look to the preceding rail rates to add to its compensation. In the last analysis it is the shipper who bears both rates covering the through transportation and he cannot be asked to pay Seatrain twice for the transfer service its device performs.

This raises the question whether in any event the railroads are left free to make payments to Seatrain of the said savings, or any part thereof, because of the fact that shippers have a decided interest in such savings.

The proposition may be thus stated: The railroads hold themselves out by their rates charged against shippers to perform the break-bulk transfer service of unloading the cars, etc., and, therefore, the rates paid by the shippers include a charge of 75 cents for a service which, in their application to Seatrain traffic, the railroads will in no case be called upon to expend. Since Seatrain's new device and method of transferring (and transporting) the loaded cars enables the railroads to make this saving, the report states that it might be argued that they would properly be justified in making such part of the 75-cent payments to Seatrain as might be necessary to induce the establishment of the new method of transfer, so long as they were left with a net sav-

ing\* R. 48). However, since the rail rates exacted from shippers are not under attack, and presumptively yield adequate compensation when the 75 cents for the unloading service is expended by the railroads, the fact that any need for the expenditure is eliminated in the case of Seatrain traffic might render them unreasonable and excessive as so exacted and, therefore, entitling shippers to a reduction and also to the right to claim reparation in the amount of the excess. But if the railroads were to bargain to make continuing payments to Seatrain of 75 cents on each ton of traffic, that would substantially wipe out any saving under the rates and show the expenditures as made and, if the payments were legitimate, it would follow that shippers would be precluded from rate reductions and reparation which might otherwise be their right.

The lower court apparently considered that the Commission should have passed upon the validity of Hoboken's contract with Seatrain (R. 118). The most that was necessary in this respect was to consider whether the Hoboken could, by its con-

\* The report meets the proposition which it has posed by answering it in the negative way of stating that there is no evidence showing that payments were necessary for the purpose; that Hoboken's contract did not show that the payments were necessary since Hoboken was subject to the control of Seatrain (R. 48). The lower court was apparently misled by assuming that the Commission conceded the proposition as fundamentally sound, and it did not consider that it had been adequately and soundly met and answered (R. 117-118).

tract, extend the published rates to include service not already embraced therein; or whether all the railroads acting together could do so, except by tariff publication which would be subject to suspension and the Commission's consideration in an I. & S. proceeding." The lower court speaks of a "windfall" accruing to the trunk lines through Hoboken's contract with Seatrain (R. 117), meaning by this apparently the 75-cent expenditures the railroads were relieved from paying. As above pointed out the railroads could not bargain this saving away to Seatrain without consideration of shippers and, if by its contract, Hoboken has attempted to do so, it cannot look to the other railroads, parties to the joint rates, to share its losses based on a claim for equitable division of said rates. The principal answer is that the Hoboken could not by its contract extend the published rates to embrace the payments. The payments are continuing payments with each ton of freight and would necessarily come out of and permanently burden the rates if they could conceivably be regarded as legitimate. While a saving does result, it is one in which shippers as well as railroads have a decided interest for reasons given, and the Hoboken has no greater claim to it than the other railroads by reason of the obligation to make payments it has assumed in its contract.

\* Under Section 15 (7) of the Interstate Commerce Act.

The Commission gave due consideration to this question of "windfall" or "unearned benefit" as it described it, and for reasons stated in its report, overruled the Hoboken's contentions made thereon. The report reads (R. 48):

It is true, as complainant points out, that if the payments which it now makes to Seatrain are not borne by defendant rail lines through a decrease in their divisions and a corresponding increase of complainant's divisions, they will receive an unearned benefit: This comes about from the fact that this new method makes it unnecessary for the rail lines to perform all the service which they hold themselves out to perform under the lighterage-free rates. Those rates, however, are based on average conditions, and a similar unearned benefit would accrue if a steamship company now docking on the Manhattan water front and served by lighter should shift to a dock with direct rail connections on the Jersey shore. It would hardly be suggested that in such an event the defendant rail lines should compensate the steamship company for the change.

The reasoning of the Commission in this case calls to mind language used by this Court in the divisions case of *Baltimore & Ohio R. Co. v. United States*, 298 U. S. 349, where this Court said (pp. 358-60):

In substance, Congress by that paragraph [Section 15 (6)] authorizes the com-

mission to take into account all that is relevant to the ascertainment of fair divisions. While presumed valid, its order may be annulled if shown to rest on a misconstruction of the Act or upon inadequate or unsupported findings of fact. The commission alone is authorized to decide upon weight of evidence or significance of facts. There is no single test by which "just," "reasonable," or "equitable" divisions may be ascertained; no fact or group of facts may be used generally as a measure by which to determine what division will conform to these standards. Considerations that reasonably guide to decision in one case may rightly be deemed to have little or no bearing in other cases. Error as to the weight to be given financial needs, operating costs or other material facts is not a misconstruction of the Act.

The report shows that the commission received much evidence bearing upon the standards set by § 15 (6), to govern it in making the divisions. Appellants' claim that the order rests exclusively upon the southern lines' financial needs is negatived by the record. Many other facts were shown to have been presented and considered. There is no requirement that the commission specify the weight given to any item of evidence or fact or disclose mental operations by which its decisions are reached. Useful precision in respect of either would be impossible. And it would be futile upon the record to attempt definitely

to ascertain the weight assigned to any fact or argument in prescribing the divisions. We find no support for appellants' claim.

This Court also said that "in prescribing divisions found by it to be just, reasonable, and equitable," the Commission's findings of fact, supported by evidence, are conclusive (p. 364). It must be remembered that Hoboken's complaint brought in issue only the divisions of rates and revenues between the Hoboken and its trunk line connections for rail services performed on lighterage-free freight beyond the point of receipt and delivery of the freight at foot of ship's tackle or alongside vessel. The Commission was not called upon to consider the divisions of Seatrain.

On earload freight transported by the trunk-line railroads, the Hoboken, and Seatrain as connecting carriers, Hoboken acts as an intermediate or bridge line, but the freight is handled in railroad cars in continuous service. Although the transportation does not end at the Seatrain ear cradle, the controlling fact is that the Commission was only required to determine at what point, under the rates to be divided, rail transportation commenced or ended. Under section 15 (6), of course, the relative amounts and costs of service expended by the parties are of special importance. *Baltimore & O. R. Co. v. United States*, 298 U. S. 349, 360. The only service or costs which can be considered in this connection are those expend-

ed in performing the service covered by the rates to be divided, and in this connection, it was necessary for the Commission to determine what were covered by the rates to be divided. On the evidence presented, the Commission made such determination (R. 47).

Having made the determination that the rail service under the rates to be divided ended at the Seatrain cradle, the Commission could not of course award to the Hoboken increased divisions for any expense voluntarily assumed by it covering a service or facilities east of the cradle.

Hoboken's argument is based upon the erroneous premise that there is a fixed obligation on the eastern railroads to load or unload *all* carload freight moving under lighterage-free rates to and from New York harbor and that Seatrain's patented devices and method of operation with cradle and crane relieve the railroads of the expense which they would otherwise incur in satisfying the obligation to load or unload the freight cars if the connecting water line were a break-bulk steamship; and that Seatrain should be reimbursed for its entire patent expense because of the financial benefits accruing to the railroads (R. 38, 47).

The fact is that 'the rail carriers' only obligation in effecting an interchange of lighterage-free freight with a water carrier at New York harbor, whether a break-bulk steamship or Seatrain, is to

deliver or receive the freight alongside the ship so that the water or rail transportation may be completed by the connecting line (R. 34). There is no tariff or other obligation on the trunk-line railroads, or on the Hoboken, to load or unload *all* lighterage-free freight. Their obligation is to place the freight or receive it from alongside the vessel. The railroads' transportation service and the costs incurred therefor, in delivering lighterage-free freight to or receiving it from the steamships at New York harbor, are not uniform and vary greatly under the different circumstances presented (R. 48). Freight sometimes is lightered by the railroads to and from certain break-bulk steamships at piers in Brooklyn, Manhattan, or the Jersey shore, and placed at or received from the foot of ship's tackle.

On lighterage-free freight interchanged with a break-bulk steamship the expense of loading or unloading the railroad cars is borne by the rail carriers if such service is necessary to placement or receipt of the freight alongside vessel (R. 47). Lighterage service is a frequent incident in accomplishing the interchange of such freight with break-bulk steamships not directly served by rail. At certain railroad terminals, particularly on the Jersey shore in New York harbor, open-top equipment may be placed on road tracks and facilities adjacent to the piers (R. 418). When

freight is delivered direct from a car to the steamship or from the steamship to the open-top car by means of a ship's tackle, the railroad company does not assume any costs for loading or unloading the cars or any stevedoring or lighterage costs of any kind (R. 418).

As previously stated, the only obligation of the rail carriers is to place or remove the freight from alongside the ship. As an incident to the performance of this obligation the rail carriers load or unload lighterage-free freight where necessary to make the interchange with the connecting break-bulk steamship. But this does not mean that there is a separate and independent tariff obligation or undertaking to load or unload the freight whether necessary or unnecessary to such delivery or receipt. In the interchange with Seatrain the only obligation or undertaking is completely satisfied and extinguished when the freight is placed at or removed from the car cradle. Of course, if the railroads were to load or unload each car of lighterage-free freight in order to carry out the alleged obligation asserted by the Hoboken, then Seatrain would be required to perform a corresponding service in loading and unloading railroad equipment which it transports, thus nullifying the benefits accruing to Seatrain as the result of its unique method of operation. Seatrain does not want to load or unload railroad freight cars for the reason that its patented devices and facilities permit it to handle freight units of an

average weight of 30 tons (R. 39, 40), the railroads furnishing the cars as containers. In this way, Seatrain saves the stevedoring expense which is incurred by break-bulk steamship lines, reduces the turn-around time in port, and holds out an attractive transportation service to shippers. A shipper has a statutory right (49 U. S. C. A. 15 (8)) to specify the routing of shipments and presumably shipments are routed via Seatrain because breaking bulk and freight handling at the port is avoided. Shippers or consignees who elect to use Seatrain transportation service are not relying upon a bill of lading or tariff obligation that the railroads are required in all instances to load or unload the freight to and from the railroad cars at New York harbor. There is no obligation to Seatrain on the part of the rail carriers to pay to it what loading or unloading would cost them if Seatrain did not prefer to take the freight in the cars. Neither the Hoboken nor Seatrain owns freight car equipment. The Trunk-Line railroads furnish the cars, the freight is actually in the cars in the course of a through transportation movement via Seatrain when tendered to or in the possession of the Hoboken, and need not be loaded or unloaded. Reference here may be made to the Commission's report and order dated December 23, 1940, effective May 1, 1941, prescribing joint through rates between eastern trunk line and New England territories and southwestern territory applicable over Sea-

train Lines and the rail lines serving the above-mentioned territories (*Seatrain Lines, Inc. v. Akron, C. & Y. Ry. Co.*, 243 I. C. C. 199), and to other Commission reports requiring the railroads participating in through routes to interchange loaded freight cars with Seatrain. *Seatrain Lines, Inc. v. Akron, C. & Y. Ry. Co.*, 226 I. C. C., 7, 29, and *Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co.*, 237 I. C. C. 97, 99.

That the Commission had in mind the fact that the joint rates, the divisions of which here are under attack although the rates themselves are not attacked, were based upon varying conditions as before depicted, is apparent from its language (R. 48) as follows:

\* \* \* Those rates, however (lighterage-free rates), are based on average conditions, and a similar unearned benefit would accrue if a steamship company now docking on the Manhattan water front and served by lighter should shift to a dock with direct rail connections on the Jersey shore. It would hardly be suggested that in such an event the defendant rail lines should compensate the steamship company for the change.

The record shows that there are many different methods of interchange depending upon the different physical situations presented at New York harbor in connection with the receipt and delivery of freight moving under "lighterage-free" rates, and that the point at which the railroads' trans-

portation obligation begins or ends is a question of fact to be determined by the Commission in each case. In those cases where payments are made by the Hoboken and by other railroads to certain break-bulk steamship lines, the steamship lines actually perform the work of loading or unloading the railroad cars containing lighterage-free freight in order to place the freight alongside the vessel within reach of ship's tackle so that the interchange between the railroad and the water line may be accomplished. The duty to place or receive the freight alongside the vessel is a tariff obligation. Seatrain, however, performs no work or service of any kind in effecting the interchange at its car cradle alongside the ship. The Seatrain cradle and crane are used for the purpose of loading and unloading the vessel. The expense of loading and unloading break-bulk vessels at New York harbor is borne by the steamship lines and not by the railroads.

The attempt to force the Trunk Line railroads to pay for Seatrain's patents and facilities through contributions to the subsidiary corporation ignores the fact that the patents and method of transfer have a value to Seatrain and permit it to function successfully as a new type of water carrier. On in-bound traffic to Hoboken, Seatrain for its own account and to complete its transportation obligation must use its specially designed terminal facilities. On traffic from Hoboken to Seatrain, the placement by the former of the car

at the cradle alongside the vessel completes its transportation duty to deliver the freight to its connecting carrier (R. 47).

If Seatrain were to receive from Hoboken the cost of its patents and the Trunk Lines were to reimburse Hoboken, it would place the *entire* burden of transfer on the Trunk Lines. The assumption of Seatrain's patent expense by Hoboken, and ultimately by the Trunk Lines by increasing Hoboken's divisions, would in effect be requiring the Trunk Lines to bear the expense of loading and unloading Seatrain's vessels because it would transfer the actual point of interchange between Hoboken and Seatrain from alongside the ship at the car cradle to a theoretical point of interchange in the hold of the ship. Rail carriers at New York harbor do not load or unload break-bulk steamships, and such expense is borne by the water lines. The railroads merely place the freight alongside the ship. That is all they are required to do in connection with Seatrain traffic.

Seatrain pays approximately \$50,000.00 a year in royalties on its combination patents which expire in 1944 (R. 39). The Commission's report shows that in 1937, Hoboken interchanged with Seatrain 9,633 cars of freight out of a total of 15,799 carloads handled by it (R. 36). The record shows that for the last 10 months of 1937, 44.67 percent of the Seatrain trunk-line traffic

moved under lighterage-free rates. Applying this percentage to 9,633 cars produces 4,303. The average weight of the freight in cars, interchanged with Seatrain at Hoboken, is approximately 30 tons (R. 39) so that Hoboken is claiming for the benefit of Seatrain 4,303 times 30 tons times 73 cents, or \$93,235.70 a year.

There is no obligation on Hoboken to pay for Seatrain's patent rights. To the extent, if any, that Seatrain's patents are of value, they are the property of Seatrain, and not of Hoboken. These patents can be considered only in a case where Seatrain's divisions are in issue. They are not an element of the cost or value of the service rendered by Hoboken for its Trunk Line connections which under their tariffs they are obligated to perform. The value of the right of use by Seatrain is reflected in its ability to obtain traffic in competition with the break-bulk steamship lines and the all-rail routes and to do business at a profit.

No loading or unloading of Seatrain traffic being necessary to place or receive it alongside ship, the eastern trunk line railroads have paid Hoboken on such traffic the divisional allowance of 60 cents a ton prior to March 28, 1938 and 63 or 66 cents a ton subsequent thereto (R. 111), which represents an increase of 215 and 230 percent, respectively, over the 20-cent per ton allowance in effect prior to July 1, 1918 (R. 113). If Hoboken's original divisional allowance of 20 cents had been increased in accordance with the general rate in-

creases and reductions authorized by the Commission, its present allowances would be 38, 40, or 42 cents, varying as to commodities and territorial application of the rates (R. 113).

In the complaint it is alleged that the Commission's finding that Hoboken's contractual payments to Seatrain are not transportation expenses which may properly be used in support of an allowance of increased divisions is based on the corporate relationship of Hoboken and Seatrain (R. 17). That the foregoing position of Hoboken is unsound is demonstrated by the language of the Commission's decision which shows that the contract was considered but held not to have conclusive and controlling evidentiary effect in the disposition of the issues presented (R. 48-49).

The corporate relationship of the contracting parties is of legal significance only to the extent that it explains the reason for the existence of the contract. Since the contract relates to services and facilities east of the interchange at the Seatrain car cradle and not to any service or facilities which the railroads, under their tariffs and the rates to be divided, are required to furnish and provide, there was no legal obligation on the railroads to assume the financial burdens of the contract. As found by the Commission, the contract was one which the Hoboken could not make a charge upon the trunk line railroads through the medium of increased divisions for the benefit of Seatrain because rail transportation under the

rates to be divided commenced or ended at the Seatrain car cradle alongside the vessel (R. 47). The situation would be exactly the same, and equally objectionable, if Seatrain were not the parent corporation and did not own a single share of Hoboken's capital stock. In either case the contract could not be used as a basis upon which Hoboken could properly make a charge upon connecting rail lines through the medium of increased divisions.

## II

### **The Commission did not fail to make any essential finding required of it by statute**

As stated, the lower court remanded the case to the Commission to make additional findings (R. 126), which we have set out at page 15 of this brief. The necessity for those findings, relating as they do to the so-called value of a contract between Hoboken and Seatrain covering the payment for services beyond the cradle, would become important in this case, only if the Court were right on the law, a proposition which we have endeavored to refute. A reading of the report of the Commission will, we submit, convince the court that the Commission made sufficient findings. Among other things, the report reviews the control Seatrain has over Hoboken (R. 33); the investment in the crane (R. 34); the services performed by the Hoboken on Seatrain traffic from the hold yard to the cradle (R. 35); the divisions

that the Hoboken for many years has received out of the joint rates (R. 37); the services performed by the respective parties under the contracts between Hoboken and Seatrain (R. 38); the fact that other railroad lines are not required to make payments to Seatrain for their use of the same devices (R. 39); after a discussion of the evidence, a finding by the Commission that the present divisions "are sufficient to cover the cost of the service performed by complainant and also a reasonable return on the property owned or used by it in performing such service" (R. 41); a showing as to the rates of return of Hoboken compared with that of 10 New York harbor roads (R. 43-44); a description of the service which the railroads hold themselves out to perform under the lighterage-free rates (R. 47) and the finding made that "the rail lines do all that is required when they place the cars in or take them from the Seatrain cradle" (R. 47), a finding which the lower court held in accord with the evidence (R. 116). The report also gave consideration to facts and made findings on the matters which the lower court felt had not been covered in the report, viz (R. 48) whether, while the payments are not made for any service which the rail lines perform under the lighterage-free rates, there is any justification for such payments as compensation payable to Seatrain for the savings which it has accomplished for the rail lines by its new method of transfer, and the conclusion was reached "that the improved method of

transfer is only an incident to the Seatrain plan of transportation, and that the plan has sufficient advantages to impel its use and promotion by Seatrain regardless of any contributory payments from rail connections" (R. 48). The Commission also gave consideration to the question of whether the trunk lines receive an "unearned benefit," termed a "windfall" by the lower court (R. 117) as a result of the patented devices saving the trunk lines the performing of all the service which they hold themselves out to perform under the lighterage-free rates, and the conclusion reached that "those rates, however, are based on average conditions" (R. 48). The Commission further found that the payments which Hoboken makes under its contract with Seatrain cannot properly be regarded, under the evidence, as a necessary part of the costs of performing its portion of the through transportation service (R. 49), and if these payments are not included, the Hoboken is adequately compensated by its existing divisions. These subsidiary findings were followed by the Commission's ultimate finding (R. 49) that:

We find, therefore, that complainant's divisions here in issue are not unjust, unreasonably low, inequitable, or unduly prejudicial to complainant and that the corresponding divisions received by the defendant rail lines are not unjust, unreasonably high, inequitable, or unduly preferential of them. The complaint will be dismissed.

It is alleged in the complaint (R. 16) that this action in dismissing the complaint constituted a failure on the part of the Commission to comply with the statutory duty to prescribe just and reasonable divisions of joint rates between the Hoboken and its trunk-line connections.

This argument, suggesting as it does that there is a mandatory duty imposed upon the Commission to prescribe divisions in each and every case, is not supported by the language of section 15 (6) of the Interstate Commerce Act, set out at page 59, Appendix.

Under the statute the Commission is required to prescribe divisions only when it is of the opinion that the divisions under consideration, whether agreed upon or otherwise established, are or will be "unjust, unreasonable, inequitable, or unduly preferential or prejudicial." In the instant proceeding, the Commission found "that complainant's divisions here in issue are not unjust, unreasonably low, inequitable, or unduly prejudicial to complainant, and that the corresponding divisions received by the defendant rail lines are not unjust, unreasonably high, inequitable, or unduly preferential of them," and dismissed the complaint (R. 49). Since the appellee was not entitled to the relief sought and there was no wrong to be remedied, or unlawful divisional basis to be corrected, the Commission left the parties in *status quo* and quite properly did not prescribe divisions. An order of the Com-

mission prescribing divisions in the "just, reasonable, and equitable" amounts voluntarily accorded by the trunk lines to the Hoboken would have been a vain and unnecessary act clearly beyond the contemplation of the statute.

The argument that there is no existing agreement or arrangement between the Hoboken and the trunk lines as to how the rates on Seatrain traffic not loaded or unloaded should be divided between them, even if true, is of no legal significance for the reason that the statute recognizes that divisions may be the subject of agreement "*or otherwise established*," but in either event directs the Commission to prescribe divisions only when it finds they "are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial." As the amounts paid by the trunk lines to the Hoboken were found to be adequate and sufficient, the Commission was not under a duty to prescribe divisions and the only action required was dismissal of the complaint.

### III

#### **The order of the Commission is supported by substantial evidence**

It is common practice in suits to enjoin Commission orders to broadly allege that the Commission's action is unsupported by the evidence, to refute which it is sometimes necessary to greatly extend the length of a brief. In this case, similar allegations are made. While the length of

a record is not necessarily controlling, the testimony before the Commission covers 320 pages of the printed record (R. 138-457), together with 50 exhibits (R. 457-617). The entire record is before this court. We have also the important fact that the finding of the Commission (R. 47) that the "rail lines do all that is required when they place the cars in or take them from the Seatrain cradle" was accepted by the lower court and held supported by the evidence (R. 116). Indeed the principal witness for the Hoboken, Mr. Graham Brush, stated that the point of delivery between the Hoboken and the Seatrain is the loading cradle which is ship sling for Seatrain (R. 345) and that "up to the present time, Seatrain and Hoboken have considered the cradle as the point of interchange" and no other points have been agreed upon (R. 345). See also (R. 385-386). The lower court also held there was no contention that the hearing before the Commission was not fair and adequate in every way (R. 115). Also, in no less than 7 paragraphs of its bill of complaint, paragraphs VIII-XIV, inclusive, Hoboken sets forth a review of the evidence before the Commission (R. 6-15), a summation, it is true, most favorable to it, but referred to here simply to show, in appellee's view, the wide scope of the hearing.

A. Specifically, it is alleged (Complaint (XVII-b) (R. 17) that the determination of the Commission that 60 cents per ton received by Hoboken on this interchange traffic con-

stituted adequate, just, and reasonable divisions, was arbitrary and without support in the evidence (R. 17). The Commission's report fully reviews the testimony and exhibits dealing with the question of costs, in fact the greater part of its report is devoted to this discussion (R. 40-45) and it was found that the division of 60 cents (at present 63 or 66 cents) was sufficient to cover the cost of the service of Hoboken and also provide a reasonable return on the property owned or used by it in performing the service (R. 41). In his argument before the Commission, counsel for Hoboken conceded that—

if these payments by the complainant [Hoboken] to Seatrain may not fairly and properly, lawfully, be included as a part of the cost of the Hoboken for the purposes of divisions here, then the divisions which the defendants have so far allowed to the complainant are adequate division and we are not entitled to anything more (R. 619).

B. It is next alleged (complaint XVII-d) that there was no evidence to show that the corporate relationship between Seatrain and Hoboken was improperly availed of or that the contracts would not have been proper contracts under other circumstances. (R. 17). The Commission made no such finding as that complained of here. We have discussed this contention heretofore, pp. 42-43, and showed that to attempt to extend a common-carrier's obligation beyond the cradle is unlawful

and improvident, regardless of the corporate relationship of the parties.

C. Complaint is made (paragraph XVII-f.) that the Commission, in failing to find that on account of added traffic to Hoboken, there was sufficient consideration for the contract between Hoboken and Seatrail, acted arbitrarily and in disregard of the evidence (R. 18). This negative allegation presupposes that it was necessary for the Commission to make this finding. We have shown (pp. 43-47) that the Commission made all essential findings. The report of the Commission, based upon the record before it, reviewed the large amount of traffic handled by Seatrail in interchange with Hoboken (R. 36, 39) and such traffic, while undoubtedly beneficial and resulting in an increase in revenue to Hoboken, was also beneficial to Seatrail, causing the Commission to conclude the plan of operation "has sufficient advantages to impel its use and promotion by Seatrail regardless of any contributory payments from rail connections" (R. 48). The figures in this record showing the results of Seatrail's operations amply support this conclusion of the Commission. Furthermore, the Seatrail plan of operation was not new to the Commission, and since it was instituted in 1932, a great deal of litigation has been brought to the Commission. *Investigation of Seatrail Lines, Inc.*, 195 I. C. C. 215; *Seatrail Lines, Inc. v. Akron, C. & Y. Ry. Co.*, 226 I. C. C.

7; *Hoboken Mfrs. R. R. Co. v. Abilene & So. Ry. Co.*, 237 I. C. C. 97; 248 I. C. C. 109.

D. It is also alleged (complaint XVII-i) (R. 19) that the Commission "in substance" (R. 19) found, without evidence, that because Seatrain owns the stock of Hoboken, Hoboken could continue to expect that it would receive the benefits of the contract and use of Seatrain's patented devices without payment therefor (R. 19). The short answer is that the Commission made no such finding. We have heretofore shown why the contract should be disregarded despite the corporate relationship of the parties (pp. 42-43, *supra*).

E. The allegation (complaint XVII-j) (R. 19) that the Commission erred in concluding, without evidence, that "there is ample reason to conclude, also, that the improved method of transfer is only an incident to the Seatrain plan of transportation, and that this plan has sufficient advantages to impel its use and promotion by Seatrain regardless of any contributory payments from rail connections," appears to be a repetition of the contention answered in paragraph C of this chapter, p. 50, *supra*.

F. Lastly, it is urged that in dismissing the complaint the Commission is compelling Hoboken to perform transportation under the rates involved at less than its cost of so doing, contrary to the evidence (R. 20). This argument is fully dealt with in paragraph A of this chapter, pp. 48-49, *supra*.

It seems clear that the Commission's decision is supported by substantial evidence, in which case the courts will not weigh the evidence or substitute their judgment for that of the Commission. *Western Chemical Co. v. United States*, 271 U. S. 268, 271.

## IV

### The issue of confiscation

We believe that the allegation of confiscation (R. 20-21) rests upon the correctness of the Commission's holding that the amounts paid by the Hoboken to the Seatrain for the Seatrain's use of its patented device, were not properly a part of the Hoboken's operating expenses upon which it is entitled to a return in the consideration of its divisions (R. 41, 49). This was conceded by M. E. McCollester in his argument before the Commission (R. 619) where he stated:

\* \* \* \* On the other hand, if these payments by the complainant to Seatrain may not fairly and properly, lawfully, be included as a part of the cost of the Hoboken for the purposes of divisions here, then the divisions which the defendants have so far allowed to the complainant are adequate divisions and we are not entitled to anything more.

In addition to our prior discussion of this subject in Chapter I, we believe there is another answer to the charge of confiscation, and that is that the un-

supported allegations of the petition with respect to confiscation are not sufficient.

In the closely analogous divisions case of *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U. S. 74, the Court, in passing upon a claim the divisions there prescribed resulted in confiscation, used this significant language:

Appellants claim that the Commission's order, if enforced, will operate to deprive them of their property without due process of law in violation of the Fifth Amendment to the Constitution.

It is well-established by the decisions of this court that, in order to invoke such constitutional protection, the facts relied upon to prevent enforcement of rates prescribed by governmental authority must be specifically alleged and from them it must clearly appear that the enforcement of the measure complained of will necessarily deny to the utility the just compensation safeguarded to it by the Constitution.

*Aetna Insurance Co. v. Hyde*, 275 U. S. 440, 447-8, and cases cited. Here the joint rates themselves are not assailed as too low, but the claim is that the prescribed divisions are confiscatory. The same rules as to pleading and proof apply to orders prescribing divisions as to laws fixing rates. There is no allegation in the complaint, or evidence in the record to show, that any division to any of the appellants will not yield operating expenses chargeable to the service covered by it plus a reasonable re-

turn on property value fairly attributable to that service. There is no foundation in the record for the contention (Id. 88-89).

The Commission did make the definite finding (R. 49) that if the royalty payments cannot be properly regarded as a necessary part of the cost of service, as found by it, "the conclusion is warranted by the record that complainant is adequately compensated by its existing divisions." That finding by the Commission has not been refuted.

Furthermore in the concurring opinion of Justice Brandeis (concurred in by three other Justices of this Court) in *Baltimore & Ohio Railroad Co. v. United States*, 298 U. S. 349, 381-392, it is conclusively shown why no charge of confiscation can be made in a divisions case where the joint rates sought to be divided are not attacked as unreasonable. We refer the court to the expression of these justices. They held in substance that the fault may not be in the divisions, but in the joint rates not attacked; such joint rates may be too low to afford to all participating carriers "just, reasonable, and equitable divisions." The joint rates between Hoboken and the Trunk lines are not under attack in this case, but only the divisions of those rates. For the reasons stated by the concurring justices in the case last referred to, as well as for the other reasons set forth above, there is no merit to the charge of confiscation.

## V

**The case is not moot**

There remains for consideration the question of whether the case is moot because the vessels of Seatrain are not now operating but have been taken over by the Government for other purposes. None of the parties have expressed a desire to have the case disposed of as moot, and we are not now so contending, but we do feel the court should be apprised of the fact that on or about, February 1, 1942, service to Hoboken by Seatrain vessels was discontinued, and the vessels were placed in other Government service. Generally during the temporary lack of boat operation, the Commission has found that water carriers subject to its jurisdiction have attempted to keep their tariffs revised to reflect the general basis of rates of other carriers now handling the traffic which normally moves over the water routes. Such action assumes that the conditions which obtained prior to the cessation of boat service will recur when service is resumed. The same situation exists here. When the boats are returned to Seatrain, if the Commission's order is in effect, the parties can resume operations immediately and a known basis of divisions will exist.

The fact that all parties seek without delay a decision on the merits was given some weight by the Court in sustaining the constitutionality of the Recapture Clause of the Interstate Com-

merce Act, involved in *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 475. In connection with this question of mootness, the court is referred also to its decision in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, at which time orders of the Commission were limited to a period of two years, which had expired when the case reached this Court. In the *Southern Pacific Case*, the court held that the case was not moot where interests of a public character are asserted under conditions that may be immediately repeated, merely because the order had expired (pp. 515-516).

Also, an examination of Hoboken's complaint to the Commission will show that in addition to a new basis of divisions for the future, it also asked for an "adjustment" for the past (R. 26). Whether it is entitled to such "adjustment" cannot of course be determined if the case is held moot.

#### CONCLUSION

We submit that the lower court erred in ordering the case to be sent back to the Commission for evaluation of Seatrain's patent rights as an element for consideration in fixing Hoboken's divisions. Unless the Court is of the opinion that the Commission should be overruled on the factual question as to where the breaking point is located between rail and water service, and where the carriers' obligation under the rail rates to be

divided or under their primary divisions west of shipside at Hoboken end, the suggested procedure would be entirely futile. Stated otherwise unless the Court were to hold that the service covered by the rates or primary divisions received by eastern railroads (including Hoboken) embraces the service and facilities of Seatrain located east of the Seatrain car cradle and covered by the contractual payment of the Hoboken to Seatrain, reference of the case to the Commission appears idle. It is well settled that the courts will not substitute their judgment for that of the Commission on factual questions as to where transportation begins and ends, unless such finding is without support in or directly contrary to the evidence.

For the reasons above stated, we respectfully submit that the decision of the lower court should be reversed.

E. M. REIDY,

*Assistant Chief Counsel,*

*For Interstate Commerce Commission.*

DANIEL W. KNOWLTON

*Chief Counsel,*

*Of Counsel*

## APPENDIX

### STATUTES

#### Declaration of Policy, added by the Transportation Act, 1940:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preference or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Pertinent sections of the Interstate Commerce Act are:

**SECTION 1 (4).** It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof which shall not unduly prefer or prejudice any of such participating carriers.

**SECTION 15 (6).** Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential, or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be re-

ceived by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line; and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.